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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ERIC KAINOA HU, Defendant and Appellant.	C059072 (Super. Ct. No. F103680A)

Defendant, Eric Kainoa Hu, was convicted by a jury of 15 felonies, various enhancements, and three misdemeanors for crimes he committed on six days over a several month period in 2007.[1] The trial court found defendant had two prior serious

[1] Specifically, the jury found defendant guilty of the following felonies: (1) attempted murder on February 23, 2007--count 1 (Pen. Code, §§ 187, subd. (a), 664); (2) assault with a firearm on February 23, 2007--count 2 (Pen. Code, § 245, subd. (a)(2)); (3) discharge of a firearm in a grossly negligent manner on February 23, 2007--count 3 (Pen. Code, § 246.3); (4) false imprisonment by violence or menace as a lesser included offense of kidnapping on February 23, 2007--count 4 (Pen. Code, § 236); (5) vehicle theft on February 23, 2007--count 5 (Veh. Code, § 10851); (6) felon in possession of a firearm on February 23,

felony convictions within the meaning of the three strikes law.[2] Defendant was sentenced to a total of 305 years in state prison.[3]

2007--count 6 (Pen. Code, § 12021, subd. (a)(1)); (7) evading police while operating a motor vehicle with willful and wanton disregard on February 28, 2007--count 7 (Veh. Code, § 2800.2); (8) vehicle theft on February 27/28, 2007--count 8 (Veh. Code, § 10851); (9) felon in possession of ammunition on February 28, 2007--count 10 (Pen. Code, § 12316, subd. (b)(1)); (10) conspiracy to commit an escape on April 9, 2007--count 11 (Pen. Code, § 182, subd. (a)(1)); (11) escape while felony charges pending on April 9, 2007--count 12 (Pen. Code, § 4532, subd. (b)(1)); (12) felon in possession of a firearm on April 26, 2007--count 13 (Pen. Code, § 12021, subd. (a)(1)); (13) felon in possession of ammunition on April 26, 2007--count 14 (Pen. Code, § 12316, subd. (b)(1)); (14) attempted robbery on April 26, 2007--count 16 (Pen. Code, §§ 211, 664); and (15) assault with a firearm on April 26, 2007--count 17 (Pen. Code, § 245, subd. (a)(2)).

With respect to three of the felony counts: count 1 (attempted murder), count 4 (false imprisonment), and count 16 (attempted robbery), the jury found true the allegation that defendant personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b). With respect to two counts: counts 2 and 17 (assault with a firearm), the jury found true the allegation that defendant personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a).

The jury also convicted defendant of the following three misdemeanor offenses committed on two dates: (1) hit and run resulting in property damage on February 28, 2007--count 18 (Veh. Code, § 20002, subd. (a)); (2) resisting arrest on February 28, 2007--count 19 (Pen. Code, § 148); and (3) resisting arrest on June 12, 2007--count 20 (Pen. Code, § 148).

[2] The trial court conducted a separate court trial at which it found defendant had two prior serious felony convictions within the meaning of Penal Code section 667, subdivisions (a) and (b)-(i), which were alleged with respect to count 1 (attempted murder) and count 2 (assault with a firearm).

[3] At sentencing, the trial court struck the Penal Code section 12022.53, subdivision (b) gun enhancement as to count 4 (false imprisonment) as inapplicable to the offense. The trial court also struck the Penal Code section 12022.5, subdivision (a) gun

On appeal, defendant challenges the sufficiency of the evidence of specific intent to kill required to support his conviction on count 1, attempted murder. Defendant claims his sentence on four counts should have been stayed under Penal Code section 654, and defendant claims remand for resentencing is necessary to allow the trial court to exercise its discretion whether to sentence concurrently on four counts pursuant to Penal Code section 667, subdivision (c)(6).[4] We accept the People's concession that the trial court erred under section 654 in failing to stay defendant's sentence for count 18 (misdemeanor hit and run), but reject all other claims.[5] We shall direct the trial court to correct its sentencing order to

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enhancement for count 17 (assault with a firearm). The trial court then sentenced defendant to state prison, imposing consecutive 25-years-to-life terms on counts 1, 4, 5, 6, 7, 8, 10, 11, 13, 14, and 16 pursuant to the three strikes law. The trial court sentenced defendant to a consecutive 10 years on count 1 and count 16 for the gun use enhancement under section 12022.53, subdivision (b) and to a consecutive five-year term for each of defendant's prior serious felony convictions under section 667, subdivision (a), on count 1. The trial court imposed 25-years-to-life sentences on counts 2, 3, 12, and 17, added terms for the applicable enhancements, but stayed them pursuant to section 654. The trial court imposed concurrent sentences for defendant's three misdemeanor convictions. The total prison sentence imposed was 305 years to life.

[4] Hereafter, undesignated statutory references are to the Penal Code.

[5] Pursuant to Miscellaneous Order No. 2010-002, we have considered whether defendant is entitled to additional presentence and custody credits pursuant to the recent amendments to Penal Code section 4019. We conclude the amendments are inapplicable to defendant. (§ 4019, subds. (b)(2) & (c)(2).)

reflect the sentence imposed for count 18 (misdemeanor hit and run) is stayed pursuant to section 654 and otherwise affirm the judgment.

FACTUAL BACKGROUND

We summarize the evidence in the light most favorable to the judgment. (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

***February 23, 2007* (Assault with Firearm, False Imprisonment, Attempted Murder, Grossly Negligent Discharge of Firearm, Felon in Possession of Firearm, Vehicle Theft)**

Defendant and his live-in girlfriend, Erica Munoz, were together all day on February 23, 2007. For a couple of hours of that day, they drove around in Munoz's mother's Dodge Caravan with Liz Munchaka, the girlfriend of their friend Chris Montano, as Munchaka tried to come up with money to repay a debt to defendant. When defendant was not repaid, he wanted to rob Munchaka of her laptop. Munoz would not agree and defendant became angry at her. After dropping Munchaka off at her mother's house, defendant and Munoz drove to a Michaels Arts & Crafts Store (hereafter, Michaels) in Stockton in order to meet Montano, who agreed to pay the money owed to defendant. When they arrived at Michaels, defendant was in the back of the van yelling at Munoz and stabbing the middle seats two or three times with a knife.

Munoz parked the van and wanted to get out and go into Michaels to use the restroom in order to get away from defendant and allow him to calm down. Defendant did not want her to go and yelled at her. It took Munoz 10 to 20 minutes to convince

him to let her leave. When Munoz was finally allowed to leave, she left the keys in the van's ignition. She also had to leave her purse and cell phone in the van. Munoz lingered in the restroom and the store for about 30 minutes because she did not want to go back to the van. When she returned to the van, defendant was still angry. Montano was now in the van as well.[6]

Defendant thought Munoz had called the police and questioned her about doing so. Munoz denied calling the police, but defendant pointed a loaded .22-caliber rifle, which earlier had been on the back seat, at Munoz's head and chest and repeatedly yelled, "I know you called the cops." Munoz felt scared and told defendant to stop pointing the rifle at her. Defendant continued to yell at her.[7] As Montano sat in the van, Munoz told defendant to get out of the van and talk to her.

Munoz got out of the van and stood by the driver's door. Defendant got out, walked around the back of the van, pointed the rifle at Munoz's chest or waist and repeatedly demanded she "[g]et in the fucking car." Defendant grabbed her and pushed her. Munoz got into the van. Defendant told Munoz to scoot over to the passenger's seat, pushed her to the other side, and got in behind her.

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[6] Montano denied being inside the van. He testified to witnessing only some of the events from his own car.

[7] Munoz testified that at some point prior to this she went into Michaels a second time to buy a soda or some candy. Defendant followed her inside and then followed her back out to the van. Defendant started yelling again.

Still angry and yelling at Munoz, defendant started the van and put it into reverse. Munoz jumped out of the van and ran into Michaels. Defendant, armed with the rifle, immediately followed her.

Munoz testified she tripped on a mat inside the door and fell forward into the store. Defendant yelled at Munoz to get up, grabbed a hold of the back of her shirt, and pointed the rifle at her feet. Munoz yelled at defendant, "Stop, Eric, stop." Defendant let go of Munoz's shirt, changed positions to stand in front of her, still pointing the gun at her feet, and fired one shot.[8] Munoz knew defendant fired the gun because she saw the bullet casing next to her feet. She got up and ran to the back of the store.

Defendant ran out of the store and drove off in Munoz's mother's van, which he did not have permission to drive.

There were four eyewitnesses to the shooting inside Michaels who testified.

Donna Matsuoka was shopping in Michaels with her daughter Jennifer when she heard a loud voice.[9] From her position near the registers, she saw a woman on the ground by the doors, crying, and a man standing over her holding a long-handled gun.

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[8] In her call to 911 and in her statement to responding officers, Munoz said defendant shot "at her."

[9] Donna Matsuoka and her daughter, Jennifer Matsuoka, both testified. We will sometimes refer to them by their first names for clarity, meaning no disrespect.

She did not see how the woman was positioned on the ground and could not tell how far over her the man was. The gun was pointed at the woman, but Donna could not tell where it was pointed at her. Donna went into the back of the store and crouched down. Donna called 911 and reported that the man came in, ran out, came back in and ran back out. She told the operator that the man had shot "at" the lady twice.

Jennifer Matsuoka heard screaming outside and thought someone was playing around outside. As Jennifer was walking towards the door of Michaels while her mother finished paying at the register, she saw a woman run in through the door, trip on the rug, and fall. A man carrying a long, brown gun followed the woman into the store. The man pointed the gun at the woman. When she saw the gun, Jennifer started towards the back of the store while keeping an eye on the man. She crouched behind some bins that she could still see through. The woman said, "Stop, Eric, stop." The man then shot the gun.

At trial, Jennifer was not sure where on the woman's body the man pointed the gun. She testified, however, her memory would have been better when she talked with an officer shortly after the incident and at defendant's preliminary hearing. On both of those occasions, Jennifer said the man stood over the woman with the rifle to the woman's chest. At the preliminary hearing, Jennifer testified the man was only a foot or two away from the woman. At one point, the gun was no more than six inches from the woman's chest. The man fired one shot and left the store. Seconds later, the man returned and fired a second

shot towards the woman in the same downward direction as the first shot. Jennifer did not see the gun fired, but was sure the man had pointed the gun at the woman's chest. Since the woman was not injured, Jennifer did not know where it was pointed "when it was fired." After the man left the second time, Jennifer went to the back of the store where her mom was calling 911.

Yolanda Sims was also a customer inside Michaels during the incident. She heard screams from a woman followed by a single gunshot and walked to a center aisle to see what was happening. Sims saw a man with a rifle in his hand. He appeared to notice the people around him. He turned and ran out the door. Sims looked to see where the man went and saw him get in a dark-colored minivan. He drove away quickly and erratically. Sims called 911. Sims identified defendant's photograph as the man with the rifle in a photo lineup.

Diane Huante was shopping at Michaels too. At trial, she testified she was standing towards the front entrance of the store when she heard a loud "ruckus" outside the doorway. A woman was screaming and crying. There was terror in the woman's voice. Although her view was somewhat obstructed, Huante soon saw the woman run into the store and towards the back. Within a few seconds, a man ran in behind her, grabbed her, pulled her backward by her hood, and tried to take her back out of the door. Huante intervened saying, "Hey, let go of her." The woman broke loose and ran towards the center aisle. The man lifted his arm and Huante saw the barrel of a rifle. The gun

came up in line with where the woman was running. Huante said, "Hey," and the man jerked and turned towards Huante, clipping one of the baskets on the corner and discharging the rifle. The man then turned around and ran out the door. Huante believed the woman stayed on her feet the entire time, although she could not say for sure if the woman went down on the ground or not. Huante testified she heard only one shot, although she testified at the preliminary hearing that there were two shots. She could not recall if the gun discharged before it hit the basket.

Stockton Police Officer Michael Serna interviewed Huante on February 23, 2007, after the shooting. Huante told him the man shot the gun once at the woman and missed. Huante did not tell the officer she told the man to leave the woman alone or that the gun hit the bin.

Stockton police found a .22-caliber shell casing inside a display bin located between 10 and 12 feet from the front door.

Munoz testified defendant subsequently apologized to her for shooting at her and asked her to forgive him.

The prosecution and defense stipulated defendant has a prior felony conviction prohibiting him from possessing guns and ammunition.

Prior Incident of Domestic Violence

Two weeks before the February 23, 2007 shooting, defendant and Munoz were arguing. Defendant thought Munoz was looking at another guy. He pushed her and pointed the same rifle at her. He pointed it at her head off and on for five hours, yelling and screaming that he would kill her in a minute and blow her head

off. The barrel of the rifle was two feet from her head. Defendant threw her about the bed and head-butted her. The apartment security officers responded to the loud voices and defendant calmed down. Munoz filed for a restraining order after the incident, but never followed through on it because she was talking to defendant again.

February 27, 2007 (Vehicle Theft)

At approximately 4:45 a.m. on February 27, 2007, Kevin Book was in his bedroom above his garage when he heard his garage door open. He ran downstairs and opened the front door in time to see his 2005 white Hummer, which had been parked in his garage, being driven around the corner. Book did not know defendant, Montano, or Jeremy Walker and never gave them permission to take or drive his car. Book left a set of keys in the car and the side door to the garage open that night. Book also left some personal items in his car, but did not have any shotgun shells or wire cutters in the car when it was taken. Shotgun shells and wire cutters were found in the Hummer when it was recovered the next day.

February 28, 2007 (Evading Police, Hit and Run, Resisting Arrest, Felon in Possession of Ammunition)

On the evening of February 28, 2007, Stockton Police Sergeant Kenneth Robinson observed Book's stolen Hummer. Defendant was driving the Hummer, Walker was the front passenger, and Montano was the rear passenger. Robinson positioned his car to pull in behind the Hummer, but defendant noticed him and accelerated around traffic, ran a red light, and

drove away. A high-speed chase ensued with several police vehicles chasing defendant, with their lights and sirens on, as he drove through stop signs, ran red lights, traveled on the wrong side of the street going against traffic and nearly collided with other cars. The right front tire of the Hummer shredded. At one point, defendant tried to squeeze between two cars waiting at an intersection and hit one of the cars, damaging both the Hummer and the other car. Defendant did not stop for the accident, and did not stop until he drove onto a levee road. The two patrol cars immediately behind him were not able to stop, and drove into the adjacent canal.

Defendant fled into the canal. Walker tried to flee along the canal bank, but was caught. Montano unsuccessfully tried to hide in the backseat of the Hummer.

Seeing defendant crossing the canal in front of him, Robinson crawled out of the window of his patrol car and pursued defendant. Two other officers were able to position their cars on the other side of the canal to intercept defendant as he ran from Robinson. Defendant was tackled by the officers. Defendant fought and struggled as three officers were finally able to place handcuffs on him. Defendant subsequently told a responding paramedic: "I was driving recklessly and I probably endangered people's lives."

Among other items found in the Hummer were two shotgun shells in the middle console between the driver and the passenger.

***April 9, 2007* (Conspiracy to Commit Escape, Escape)**

On April 9, 2007, Montano told the officers at the San Joaquin County Jail Honor Farm that he had to be in court that morning. He was taken to the courthouse where he met defendant and Walker. After their court appearances, defendant, who wanted to get out of jail, wanted to switch his orange jail clothes with Montano who was wearing the blue jail clothes for the Honor Farm. Montano took off his clothes and dropped them in a toilet stall. Defendant gave his clothes to Montano. Montano returned to the jail wearing defendant's orange clothes. He did not alert officers about the clothing switch until after he arrived at the south jail. Montano told the officer he was assaulted for his clothes, which was a lie. Meanwhile, defendant returned to the Honor Farm wearing Montano's blue clothing and falsely represented himself as Montano.

Mid-afternoon April 9, 2007, Munoz received a telephone call from an unknown person asking her to pick up Montano from the Honor Farm. Munoz drove to the Honor Farm and waited in her van in the parking lot. As she was waiting, she looked up and saw defendant on the roof of the Honor Farm. Defendant jumped off of the roof, ran to her van and got inside. Defendant told her to "just fucking drive." Munoz did not try to alert authorities and did as defendant instructed. Defendant was upset that Munoz was not happy to see him and Munoz worried defendant would get upset. Defendant told Munoz to drive to his cousin's house. When they arrived, defendant took the battery out of Munoz's cell phone and went inside.

***April 26, 2007* (Felon in Possession of Firearm, Felon in Possession of Ammunition, Attempted Robbery, Assault with a Firearm)**

Defendant and Munoz stayed with defendant's friend, Robert Oki, living in Oki's van. On April 26, 2007, Oki drove defendant in the van to a friend's apartment. Inside the van was a .12-gauge shotgun concealed in a black pool stick case, a pellet gun, ammunition, a couple of police scanners and a dagger. The guns and ammunition belonged to defendant.[10]

At the apartment complex, defendant and Oki repeatedly knocked on the door of an apartment. No one answered and they left. Unbeknownst to defendant and Oki, the resident of the apartment called the police to report that defendant and another man were knocking on his door before leaving in a blue minivan. A Stockton police officer was in the area and as he entered the apartment complex, he saw a blue van fitting the description leaving the complex. He activated his lights and siren. The van pulled over and defendant jumped out and ran away toward Interstate 5. The officer arrested Oki while another officer who had arrived chased defendant. Oki told the arresting officer that defendant was holding a dagger-type knife in his hand.

Defendant escaped by crossing Interstate 5 on foot. Defendant was almost hit by a driver on the freeway, who saw him jump a fence on the other side of the freeway into the back of a

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[10] Oki initially testified the items in the van were his. Unable to keep his story straight, he eventually admitted they belonged to defendant.

church. The driver thought defendant was carrying something, which he was trying to conceal. A subsequent search of the church area revealed a knife and a bandolier type of belt containing shotgun shells.

Later that night, Damon Ashby was confronted by a man in his backyard as Ashby took out his garbage. The man, holding a gun, demanded keys to a car and money. As Ashby backed up towards the door of his house, he saw the man raise the gun in his direction. The man told Ashby that if he did not give him the keys and money he would come into his house and blast his family. Ashby went into his house and called 911. An officer arrived very quickly and showed Ashby defendant's picture. Ashby told the officer he was sure defendant was the man in his backyard. Ashby told the officer defendant pointed the gun "at" him.

***June 12, 2007* (Resisting Arrest)**

On June 12, 2007, as Stockton Sheriff's Deputy Mike Jones was on duty and driving, he heard a radio broadcast that defendant had jumped out a back window in the area and was running through backyards. Jones observed defendant run out from between two houses. Another unmarked police vehicle that was traveling on the street hit defendant and spun him around. Jones parked and started running towards defendant. Jones was wearing a vest with "Police" marked on the front and back. Defendant ran back and forth between parked cars until grabbed by Jones. Both of them fell to the ground. Defendant struggled to get away until additional officers arrived to assist Jones.

DISCUSSION

I.

Sufficiency of the Evidence of Attempted Murder

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 573]; accord, *People v. Lewis* (2009) 46 Cal.4th 1255, 1289-1290.) In other words, "[i]f the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. [Citations.]" (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) "We '"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 509.)

Defendant claims there is no evidence that he shot at Munoz with the specific intent to kill required for attempted murder. He emphasizes that no one testified they saw him pull the trigger or that the rifle was aimed at a vital part of Munoz's

body "when it fired." He argues Munoz consistently testified he pointed the gun at her feet. Huante testified essentially to an accidental discharge of the gun. He points out that neither Munoz nor anyone else was injured. The only shell casing found was located in a display bin. Defendant claims the only intent established by the facts "is an intent to scare Munoz into submitting to his will." We conclude sufficient evidence supports the jury's verdict of attempted murder.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A person is guilty of attempted murder where he or she does a direct but ineffectual act toward the killing of a human being while harboring the specific intent to unlawfully kill a human being (i.e., express malice aforethought). (§ 21a; see also § 664; *People v. Ervine* (2009) 47 Cal.4th 745, 786; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 (*Chinchilla*).)

"One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer's actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946 (*Lashley*); see *People v. Smith* (2005) 37 Cal.4th 733, 741 (*Smith*) [intent to kill may be inferred from defendant's acts and the underlying circumstances].) "The fact that the shooter may have fired only

once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." (*Lashley, supra*, at p. 945; accord, *Smith, supra*, 37 Cal.4th at p. 741.) "[A] defendant may properly be convicted of attempted murder when no injury results." (*People v. Avila* (2009) 46 Cal.4th 680, 702.) "The very act of firing a .22-caliber rifle toward the victim at a range and in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . ." (*Lashley, supra,* at p. 945; *Chinchilla, supra*, 52 Cal.App.4th at p. 690.) Applying these principles, we conclude the jury reasonably found an intent to kill here.

Jennifer Matsuoka was not sure at trial where on Munoz's body defendant had pointed his rifle, but testified her memory was better when she gave her statement to the officer at the scene and when she testified at defendant's preliminary hearing. On those occasions, Jennifer said she observed defendant, a mere foot or two away from Munoz, standing over Munoz with his rifle to her chest. At one point the gun was no more than six inches from Munoz's chest. Defendant fired one shot and left the store. True; Jennifer did not see the gun actually fired and because Munoz was not injured, she did not know where the gun was pointed "when it was fired." But defendant places too much weight on these points. In context, Jennifer's testimony states

only the obvious--at the precise moment the rifle was fired, it must not have been pointed at Munoz's chest or she would have been hit. However, the jury could reasonably have concluded that the reason for this fortunate circumstance was defendant being distracted by the immediate presence and actions of the customers in Michaels such that his aim changed at the last moment.

Jennifer's testimony was supported by her mother's testimony. Donna Matsuoka testified she saw defendant standing over Munoz, who was on the ground by the doors, holding a long-handled gun. The gun was pointed "at" Munoz. Defendant shot "at" Munoz.

Admittedly, Huante testified to a somewhat different version of the events. At trial, she testified to her intervention and, consequently, defendant's accidental discharge of his rifle when he turned towards her and hit the gun on a corner of a display basket. However, Huante did not tell this version of events to the officer who responded to the scene. Huante told the officer the man shot the gun once at the woman and missed. The jury was not required to accept her trial version of the events. But even if the jury did believe Huante's trial description of the shooting, Huante's testimony was not unavoidably inconsistent with defendant having an intent to kill Munoz before he turned to Huante. Huante testified she saw defendant lift his rifle in line with where Munoz was running. Huante then said, "Hey, let go of her" and defendant jerked and turned towards her. Huante testified at defendant's

preliminary hearing that there were two shots. At trial, she testified there was one shot. She could not recall if the gun discharged before as well as after it hit the basket.

Nor do we find the evidence of specific intent to kill necessarily dispelled by Munoz's testimony that defendant aimed only at her feet. The jury heard evidence from Dr. Linda Barnard, an expert in intimate partner battering, that minimizing, which is describing a situation as less serious than it is, is common for victims of intimate partner battering. Munoz minimized a number of things in her testimony at trial. For example, she minimized the nature of the argument between her and defendant relating to Munchaka. Munoz initially testified the argument was over money but later admitted it was actually about defendant wanting to rob Munchaka. As another example, she initially testified that while they were in her van, defendant pointed his gun at her, then said it was pointed at her chest, then later admitted defendant pointed it at her head and chest. After the shooting, she told the 911 operator and the responding officer that defendant shot at her--she did not say he shot at her feet. The jury could have concluded Munoz was minimizing defendant's actions at trial by saying he aimed only at her feet.[11]

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[11] We do not find it particularly significant that Munoz saw a shell casing at her feet or that the only shell casing found by officers was located in a display bin.

Add to all of this evidence, the evidence of the prior incident two weeks before the Michaels shooting when defendant pointed the same rifle at Munoz and screamed that he would kill her and that he would "blow her head off." Such prior incident plainly established defendant could become so angry with Munoz that he would want to kill her. The evidence suggests that is what happened at Michaels on February 23, 2007.

Substantial evidence supports defendant's conviction of the attempted murder of Munoz.

II.

Application of Section 654 to Counts 7, 8, 18 and 19

Defendant was convicted of unlawfully taking Kevin Book's Hummer on February 27, 2007 (count 8). Defendant was also convicted of felony evading police (count 7), misdemeanor hit and run (count 18), and misdemeanor resisting arrest (count 19) for his conduct on February 28, 2007. The trial court sentenced defendant to 25 years to life on counts 7 and 8 and imposed concurrent misdemeanor terms on counts 18 and 19. Defendant claims the sentences on counts 7, 18, and 19 should have been stayed pursuant to section 654. He asserts that the conduct underlying these counts constituted an indivisible transaction with his commission of count 8, the vehicle theft, all of which were committed with the single objective of avoiding arrest for the offenses committed on February 23, 2007. We disagree.

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 has been interpreted to prohibit multiple punishments for a single act as well as an indivisible course of conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*).) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid.*) On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.) Whether crimes constitute an indivisible course of conduct is a question of fact for the trial court, and its findings will not be disturbed on appeal if they are supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

Here, the trial court made no express finding regarding whether defendant harbored multiple criminal objectives. However, such a finding may be implied from the court's imposition of multiple, unstayed terms. As with an express

finding, "[a] trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) We review the evidence in a light most favorable to the trial court's determination and presume in support of that determination the existence of every fact the trier of fact could reasonably have deduced from the evidence. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.) We conclude that for purposes of section 654, the evidence supports the conclusion that counts 7, 18, and 19 were not part of a single objective with count 8.

Nothing in the evidence supports defendant's claim that he stole Book's Hummer on February 27 in order to avoid capture by the police for the events of February 23, which course of conduct continued through the events of February 28. Although defendant had not yet been arrested for his crimes committed on February 23, it is purely speculative that he took the Hummer on the 27th in an effort to avoid arrest for those crimes. Specifically, looking at the record as a whole, it appears defendant did not need to steal a vehicle to avoid further traveling in Munoz's mother's van or to otherwise avoid arrest as he still had access to transportation through his friends, including Montano and Oki. Moreover, the presence of wire cutters in the Hummer after it was recovered suggests defendant, Montano and Walker had some other criminal objective in mind when the police fortuitously spotted the stolen Hummer on the 28th. It was only then that defendant formed the intent to

evade the police by leading them on the ensuing high-speed chase. Defendant's objective on the 28th in avoiding arrest was, thus, separate from his intent to steal the vehicle in the first place.

Substantial evidence supports the implied finding that defendant's objective in committing the vehicle theft in count 8 was separate from his objective in counts 7, 18 and 19. But even if the crimes on February 28 were part of a broad objective of avoiding arrest that began on February 27, separate sentencing would still be appropriate for counts 7, 18 and 19 as separate in time from count 8.

"[D]ecisions since *Neal*[, *supra*, 55 Cal.2d at p. 19,] have refined and limited application of the 'one intent and objective' test, in part because of concerns that the test often defeats its own purpose because it does not necessarily ensure that a defendant's punishment will be commensurate with his culpability. [Citation.] For example, in *People v. Beamon* [(1973)] 8 Cal.3d [625,] 639, the Supreme Court stated that protection against multiple punishment under section 654 applies to 'a course of conduct deemed to be *indivisible in time*.' (Italics added [by *Kwok*].) The court added in a footnote: 'It seems clear that a course of conduct *divisible in time*, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citation.] Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted 'one indivisible course of conduct' for purposes of section 654. If the offenses

were committed on different occasions, they may be punished separately." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253, and cases cited therein.) The vehicle theft on the 27th was temporally separate from the offenses committed on the 28th.

The trial court did not err by failing to stay the sentences on counts 7, 18 and 19 pursuant to section 654 as being indivisible from count 8.

Although not raised by defendant in his opening brief, in a footnote in respondent's brief, the People volunteer that count 18 (misdemeanor hit and run) appears to be indivisible from count 7 (felony evading police while driving) as defendant struck the hit and run victim's car and fled as part of his ongoing attempt to evade police in the Hummer. In his reply brief, defendant agrees with respondent, but contends he is entitled to more--that "both counts 7 and 18 should be stayed[.]" As we have explained, defendant is not entitled to more, but we will accept the concession of the People and direct the trial court to stay the concurrent sentence imposed on count 18 pursuant to section 654.

III.

Application of Section 654 to Count 4

Defendant was convicted, as relevant here, of attempted murder (count 1), assault with a firearm (count 2), discharge of a firearm with gross negligence (count 3), and false imprisonment by violence (count 4). The trial court imposed sentences on counts 1 and 4, but stayed the sentences imposed on counts 2 and 3 pursuant to section 654.

Once again claiming he did not intend to kill Munoz, defendant argues the trial court should also have stayed the sentence on his conviction of false imprisonment by violence (count 4) as part of an indivisible transaction with counts 1, 2, and 3, all of which he claims had the single objective of harassing and controlling Munoz. We have concluded sufficient evidence supports the jury's conclusion that defendant had the specific intent to kill Munoz when he fired his rifle in Michaels (count 1--attempted murder). Defendant committed the offense of false imprisonment by violence by his conduct in forcing Munoz back into the van prior to the shooting in Michaels. The false imprisonment offense did not require and was not committed with the objective of killing Munoz, but as defendant argues, with the objective of harassing and controlling her. Thus, defendant had separate objectives and intents with respect to counts 1 and 4. The trial court did not err in imposing consecutive sentences on each conviction.

IV.

Section 667, subdivision (c)(6)--Remand For Resentencing is not Required

Defendant was sentenced pursuant to the three strikes law. (§ 667, subds. (b)-(i).) "[T]he three strikes provisions mandate that '[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to [this section].' (§ 667, subd. (c)(6); hereafter sometimes

subdivision (c)(6).) By implication, consecutive sentences are not mandated under subdivision (c)(6) . . . if all of the current felony convictions are either 'committed on the same occasion' or 'aris[e] from the same set of operative facts.' [Citations.]" (*People v. Lawrence* (2000) 24 Cal.4th 219, 222-223 (*Lawrence*).)

The analysis appropriate for determining the application of section 667, subdivision (c)(6), is not coextensive with the test for determining the application of section 654. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-595 (*Deloza*).) The California Supreme Court has explained: "We read the mandatory consecutive-sentencing provision of the three strikes law as follows: If there are two or more current felony convictions 'not committed on the same occasion,' i.e., not committed within close temporal and spacial proximity of one another, and 'not arising from the same set of operative facts,' i.e., not sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted, then 'the court shall sentence the defendant consecutively on each count' pursuant to subdivision (c)(6). Conversely, where a sentencing court determines that two or more current felony convictions were either 'committed on the same occasion' or 'aris[e] from the same set of operative facts' as we have construed those terms . . . , consecutive sentencing is not required under the three strikes law, but is permissible in the trial court's sound discretion." (*Lawrence, supra,* 24 Cal.4th at p. 233.)

Where the trial court has discretion to impose either concurrent or consecutive sentences under section 667, subdivision (c)(6), the trial court is to be guided by the criteria set forth in the California Rules of Court for imposing consecutive rather than concurrent sentences. (*Deloza, supra,* 18 Cal.4th at p. 596, fn. 8 [citing predecessor rule to current rule 4.425].)

Defendant argues a remand for resentencing is required in this case because the trial court did not understand and exercise its discretion under section 667, subdivision (c)(6), to decide whether to impose concurrent sentences for four of his convictions. Specifically, defendant argues that even if a stay of count 4 (false imprisonment) is not required under section 654, a concurrent sentence could and should have been imposed on count 4 because count 4 was committed on the same occasion as count 1 (attempted murder) for purposes of section 667, subdivision (c)(6). Defendant argues a concurrent sentence should also have been imposed on count 6 (felon in possession of a firearm) because count 6 arose from the same operative facts as count 1 for purposes of section 667, subdivision (c)(6). Defendant claims, if a stay is not required, a concurrent sentence for count 7 (felony evasion of police while driving) should have been imposed because count 7 occurred on the same occasion as count 8 (vehicle theft) for purposes of section 667, subdivision (c)(6). Defendant argues a concurrent sentence should also have been imposed on count 14 (felon in possession of ammunition) because count 14 involved the same operative

facts and arose on the same occasion as count 13 (felon in possession of a firearm) for purposes of section 667, subdivision (c)(6). If the issue is considered waived because defense counsel never asked the court to consider concurrent sentences on these counts, defendant argues ineffective assistance of counsel.

We need not decide whether defendant's "same occasion" and "same operative facts" analysis is correct for the specified counts or address the effectiveness of his trial counsel in failing to make the same arguments. Assuming that a concurrent sentence was permissible and could have been argued, the trial court could still have exercised its discretion to impose a consecutive sentence. Defendant does not claim the record is insufficient to support the imposition of a consecutive sentence on the challenged counts nor does he challenge the trial court's statement of reasons for its imposition of consecutive sentences as inadequate. Defendant complains the trial court did not mention section 667, subdivision (c)(6) and claims the trial court's imposition of consecutive sentences was not "informed[,]" i.e., that the court failed to understand it had discretion to choose a concurrent sentence under section 667, subdivision (c)(6). We disagree.

Remand for resentencing is required when the record affirmatively shows the trial court misunderstood the scope of its discretion to impose concurrent sentences in a three strikes case. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 994-995; see *People v. Fuhrman* (1997) 16 Cal.4th 930, 944.) However,

where the record is silent as to the court's exercise of its discretion, we must presume the trial court understood its discretion and sentenced defendant accordingly. (Evid. Code, § 664; *People v. Fuhrman, supra,* 16 Cal.4th at pp. 944-946; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497.)

Nothing in the record here indicates the trial court misunderstood the scope of its discretion under section 667, subdivision (c)(6) or that it believed consecutive sentences were mandatory for all the felony counts not stayed. In fact, defendant's sentencing brief specifically brought section 667, subdivision (c)(6) and *Deloza, supra,* 18 Cal.4th 585, to the trial court's attention, albeit with respect to count 1 (attempted murder), count 2 (assault with a firearm), and count 3 (negligent discharge of a firearm). The People's sentencing brief also noted generally the provisions of section 667, subdivision (c)(6).[12] At sentencing, the trial court stated it had received and considered defendant's brief, as well as defendant's motion to strike his priors, the People's sentencing

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[12] The prosecutor's sentencing brief stated: "[B]ecause the defendant has been convicted of two prior strikes, any current conviction for more than one felony count *not* committed on the same occasion, and *not* arising from the same set of operative facts, according to Penal Code section 667[, subdivision] (c)(6) requires the court to sentence the defendant consecutively on each count pursuant to [section 667,] subdivision (e)." (Italics added.) The prosecutor provided no analysis or argument regarding whether defendant's felony convictions were or were not committed on the same occasion or whether they did or did not arise from the same set of operative facts for purposes of section 667, subdivision (c)(6).

brief, and the probation report. The trial court also stated it "has . . . reviewed and considered the criteria regarding concurrent and consecutive sentences set forth in California Rules of Court [rule] 4.425, and also the Court having previously found [defendant]--found beyond a reasonable doubt that he suffered two prior serious felony convictions, the Court's sentence in this matter is also guided and directed by Penal Code section[s] 667 and 1170.12[.]" The trial court proceeded to sentence defendant to consecutive sentences.

On this record, remand for resentencing is not required.

DISPOSITION

The trial court is directed to correct its sentencing order in this case to reflect that the sentence imposed for count 18 is stayed pursuant to section 654. The judgment is affirmed in all other respects.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

RAYE, J.